SUPREME COURT, U. S.

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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 243

BLOUNT BROTHERS CONSTRUCTION COMPANY,
Petitioner,

v.

J. P. GREATHOUSE STEEL ERECTORS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR J. P. GREATHOUSE STEEL ERECTORS, INC. IN OPPOSITION

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PRELIMINARY STATEMENT

Petitioner is attempting to establish a case not made and also fails to present the case as it appeared in the court below. As thus viewed, the "questions presented" by petitioner are rhetorical, self-serving postulates.

The single subcontract (R. 5-12)[1] on petitioner's form covered steel erection by respondent, J. P. Greathouse Steel

[1] Refers to pages of Joint Appendix in court below filed here as part of the record by petitioner.

Erectors, Inc., on a number of prime contracts between the District of Columbia, through two of its Departments, and Blount. The subcontract price was an estimated aggregate amount of $119,807.50.

Greathouse instituted suit in the District Court charging Blount with various breaches of the subcontract, including wrongful termination thereof, as well as failure to pay for additional work Greathouse asserted it was not obligated to do under the subcontract. Without filing an answer and counterclaim (as it asserted damages in the amount of $157,742.38 against Greathouse for breach of the subcontract), Blount moved in the District Court (R. 13) to compel arbitration and for a stay pending arbitration. The District Court ordered (R. 20) Greathouse and Blount "to proceed forthwith to arbitrate all matters in dispute which are subject to arbitration under the contract between them, the decision of the arbitrators to be final and binding on the parties," and proceedings in the court action were stayed subject to the further order of the court upon issuance of the arbitration award.[2] The arbitration clause in Blount's form of subcontract was intentionally restricted to questions of fact arising under the subcontract (R. 11).

Blount, a prime contractor experienced on federal government contracts[3], in its arbitration clause (Article XIII,

[2]While Blount moved pursuant to 9 USC, Sections 3, 4 and 6, only Section 3 relates to motion in a pending case and there the statute restricts the court to a stay, if the court is satisfied the issue is referable to arbitration. To compel arbitration, a party seeking it must file an independent proceeding under Section 4, which affords an inquiry into the case and permits a full trial on the issues. Thus, the Act as a whole evinces a concern for due process. Section 6 is without significance here. Neither of the courts below dealt with the differences between Sections 3 and 4.

[3]*Blount Bros. Construction Co. v. United States,* 171 C. Cls. 478, 346 F.2d 962. Appeal of Blount Bros. Construction Co., 60-1 BCA 2634; Appeal of Blount Bros. Construction Co., 60-2 BCA 2662; Appeal of Blount Bros. Construction Co., 61-1 BCA 3055; *United States v. Blount Bros. Construction Co.*, 168 F. Supp. 407.

R. 11), evidently chose the standard form of Federal Government Disputes Clause, with its limited scope, as its model for adaptation and correspondingly rejected the standard American Arbitration Association clause, which if used, would have obviated the court proceedings. In addition to limiting the scope of the arbitration clause, not embracing at all questions of law, Blount specifically reserved in its subcontract (Article XV(e), R. 11) for court action all legal rights and remedies which it had against Greathouse for breach of the subcontract or default thereunder afforded by state or federal law.

The issues Petitioner seeks to raise do not warrant further review by this Court.

1. In view of the foregoing and of the opinion of the Circuit Court of Appeals, it may not be contended by petitioner that the arbitration award was valid on its face, or that the Appellate Court presumed the arbitrators exceeded their authority and, simply upon that presumption, vacated the award.

In *United States v. Utah Mining and Construction Company*, 384 U.S. 394, 16 L. Ed. 2d 642, 86 S. Ct. 1545, this Court, after exhaustive review of the cases and following discussion of the scope of arbitration authority under the restrictive language, "questions of fact arising under this contract," rejected the contention that such language authorized and compelled administrative (arbitrative) action concerning all disputes arising between the parties in the course of completing the contract, and held (384 U.S. at p. 412) that the settled construction of such language excluded breach of contract claims from its coverage, whether for purposes of granting relief or for purposes of making binding findings of fact. In such respects, this Court upheld similar views of all of the members of the Court of Claims in Utah.[4]

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[4]The Court of Claims held (168 C. Cls. 522, 526, 339 F.2d 606, 609) that the language "arising under the contract" limited the arbi-

Moreover, the meaning and elements of damages in breach of contract actions concern questions of law. *Prudence Co. v. Fidelity and Deposit Company of Maryland,* 297 U.S. 198, 80 L. Ed. 581, 56 S. Ct. 387.

Arbitration is a matter of contract and a party cannot be compelled to arbitrate any dispute he has not agreed to arbitrate. *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318; *Wiley & Sons v. Livingston,* 376 U.S. 543, 11 L. Ed. 2d 898, 84 S. Ct. 909.

2. The contention made by petitioner and posed as its second question presented that Greathouse in some fashion – apart from the petitioner's motion in the District Court to compel arbitration and that court's order granting Blount's motion, compelling arbitration, and staying Greathouse's suit subject to further order of the court voluntarily and independently submitted to arbitration is without merit and is not even open to Blount, which should be estopped to make it. The award of the arbitrators expressly stated (R. 21) that it was "pursuant to an order of the United States District Court of the District of Columbia, entered April 28, 1965, in Civil Action No. 2635-64, * * *" which was the number of the suit brought by Greathouse in that court. While petitioner has printed the form of submittal used by the parties as Exhibit C to its petition, the record (Exhibit to Blount's petition for rehearing in the Appellate Court) shows that it was on a form of the Association. Moreover, petitioner's contention of voluntary submission was made for the first time in its petition for rehearing.

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tration and jurisdiction authority and did not embrace or include a dispute over a violation of the contract. See also concurring opinion of Judge Davis. Clearly the long-standing court interpretations of the arbitrable scope of "questions of fact arising under this contract" is the reason why the American Arbitration Association chose the language it employs in its standard arbitration clause (R. 15).

3. The final question presented and argued by petitioner ignores the portion of the opinion of the Circuit Court of Appeals (Appendix A to Petition, p. 2a) holding that the narrow language of Blount's own form of arbitration clause excluded agreement to arbitrate legal questions and claims for breach of contract. In *Utah, supra,* this Court so construed such language as constituting the intention of the parties to exclude breach of contract damages claims from the scope and intendment thereof. Here there is not only such restriction and exclusion arising from the use of the language, "questions of fact arising under this contract," but also the express reservation of Blount in Article XV(e) of its standard form of subcontract.

In view of the record in this case and of the action of the arbitrators, the assertion of petitioner that the decision of the Court of Appeals is "reactionary" – whatever that may mean – is a flagrant impropriety. *A fortiori,* is that so in the light of this Court's decision in Utah.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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